

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 05-12681-JMD
Chapter 7

Jeremiah Evarts and
Joanne C. Evarts,
Debtors

River Valley Country Day School,
Plaintiff,

v.

Adv. No. 06-1028-JMD

Jeremiah Evarts and
Joanne C. Evarts,
Defendants

William S. Gannon, Esq.
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Attorney for Debtors/Defendants

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MEMORANDUM OPINION

I. INTRODUCTION

On January 26, 2006, the Debtors filed a notice of removal of a state court action brought by River Valley Country Day School (the “School”) against the Debtors prepetition in Sullivan County Superior Court (the “Suit”). The Suit contains four causes of action: conversion, breach of fiduciary duty, unfair or deceptive act or practice under NH RSA 358-A, and willful and wanton conduct. The School filed a motion seeking remand of the Suit on the grounds that the

Suit involves routine, garden-variety state law causes of action, i.e., nothing that would require this Court's unique expertise. The Debtors objected to the motion on the grounds that the Suit involves the allowance or disallowance of claims against the estate and prosecution of counterclaims by the estate, which are core proceedings, and that it would be inequitable because remand would impose heavy travel costs and expenses on the Debtors and would subject them to a far less efficient litigation process. The Court held a hearing on the motion on February 23, 2006, and took the matter under advisement.

II. DISCUSSION

A. Background

Section 1452(a) of title 28 provides that “[a] party may remove any claim or cause of action in a civil action . . . to the district court for the district where such action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.” 28 U.S.C. § 1452(a). Section 1334(a) of title 28 provides that “district courts shall have original and exclusive jurisdiction of all cases under title 11.” 28 U.S.C. § 1334(a). As articulated by the United States Bankruptcy Appellate Panel for the First Circuit, under 28 U.S.C. § 1344(b), “a party may remove a cause of action from state court to the bankruptcy court if it is an action arising under title 11, or arising in or ‘related to’ a case under title 11.”

Work/Family Directions, Inc. v. Children’s Discovery Centers, Inc. (In re Santa Clara County Child Care Consortium), 223 B.R. 40, 43 (B.A.P. 1st Cir. 1998). Actions “arising under” title 11 or “arising in” a case under title 11 are referred to as “core” proceedings and are specifically referenced in 28 U.S.C. § 157(b)(2). McDowell Welding & Pipefitting, Inc. v. United States

Gypsum Co., 285 B.R. 460, 471 (D. Or. 2002). Actions that are “related to” a case under title 11 do not involve a substantive right created by the federal bankruptcy laws and could be maintained outside of the bankruptcy proceeding, but the outcome of the action could have an effect on the bankruptcy estate. Id. at 472. Related to actions are “non-core” proceedings. Id.

Section 157(a) of title 28 provides that “district court[s] may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.” 28 U.S.C. § 157(a). The United States District Court for the District of New Hampshire has referred all cases and proceedings in bankruptcy to this Court pursuant to 28 U.S.C. § 157(a) and the District Court’s standing order dated January 18, 1994. See LR 77.4(a). Section 157(b)(1) of title 28 provides that “[b]ankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments” 28 U.S.C. § 157(b)(1). “A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11.” 28 U.S.C. § 157(c)(1). However, in any such non-core proceeding, “the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge’s proposed findings and conclusions after reviewing de novo those matters to which any party has timely and specifically objected.” Id. With the consent of the parties, however, a bankruptcy judge may hear and determine a non-core proceeding related to a case under title 11 and enter appropriate orders and judgments. Id. § 157(c)(2).

When presented with a motion to remand a proceeding which has been removed from the state court, the bankruptcy court must first evaluate whether the state

court action was properly removed; that is, it must determine whether it has subject matter jurisdiction over the proceeding. In doing so, the bankruptcy court must decide whether the removed action is one arising under or arising in a case under title 11 or is an action “related to” a case under title 11.

Santa Clara Child Care, 223 B.R. at 44.

B. Bankruptcy Court Jurisdiction

The first issue then before the Court is whether the Court has jurisdiction over the School’s Suit against the Debtors such that removal under 28 U.S.C. § 1452(a) was proper. This involves a determination that one of the three bases for jurisdiction under 28 U.S.C. § 1334(b) applies. If the Court finds that it has jurisdiction, the Court must then determine whether grounds exist under 28 U.S.C. § 1452(b) to remand the Suit to Sullivan County Superior Court. Id. Section 1452(b) of title 28 permits a court to which a claim or cause of action has been removed to “remand such claim or cause of action on any equitable ground.” 28 U.S.C. § 1452(b). As part of that determination, the Court may consider the mandatory and discretionary abstention provisions of 28 U.S.C. § 1334(c).

The Suit is an action “arising under” title 11 if it involves a cause of action created or determined by a statutory provision of the Bankruptcy Code. New England Power & Marine, Inc. v. Town of Tyngsborough (In re Middlesex Equip. & Marine, Inc.), 292 F.3d 61, 68 (1st Cir. 2002); Santa Clara Child Care, 223 B.R. at 43 n.2 (citing Goldstein v. Marine Midland Bank, N.A. (In re Goldstein), 201 B.R. 1, 4 (Bankr. D. Me. 1996)); Drexel Burnham Lambert Group, Inc. v. Vigilant Ins. Co., 130 B.R. 405, 407 (S.D.N.Y. 1991) (cited in Port Auth. of New York and New Jersey v. CCI-Bowers Co., No. 91-5681 (CSF), 1992 WL 164441, at *3 (D.N.J. June 15, 1992)). The Suit “arises in” a case under title 11 if it would have no existence outside of bankruptcy even if it is not based on any right expressly created by title 11. Middlesex Equip. &

Marine, 292 F.3d at 68; Santa Clara Child Care, 223 B.R. at 43 n.3 (citing Goldstein, 201 B.R. at 4); Drexel Burnham, 130 B.R. at 407 (cited in CCI-Bowers Co., 1992 WL 164441, at *3). The Suit is “related to” a case under title 11 if it could potentially have some effect on the bankruptcy estate, such as altering the Debtors’ rights, liabilities, options, or freedom of action or otherwise have an impact upon the handling and administration of the bankruptcy estate. Middlesex Equip. & Marine, 292 F.3d at 68; Santa Clara Child Care, 223 B.R. at 45 (quoting Pacor, Inc. v. Higgins, 743 F.2d 984, 993 (3^d Cir. 1984)); Drexel Burnham, 130 B.R. at 407 (cited in CCI-Bowers Co., 1992 WL 164441, at *3).

It is readily apparent that the Suit involves merely state law claims, i.e., claims for conversion, breach of fiduciary duty, unfair or deceptive act or practice under NH RSA 358-A, and willful and wanton conduct. The Suit does not “arise under” title 11 as it does not involve a cause of action created or determined by a statutory provision of the Bankruptcy Code. The Suit does not “arise in” a case under title 11 as it can, and did exist, outside of bankruptcy. Rather, the Suit is “related to” a case under title 11 as it could potentially have some effect on the Debtors’ bankruptcy estate as it may determine the amount of the School’s claim, if any, against the Debtors and could affect a plan if the Debtors’ case is ultimately converted to chapter 13. Accordingly, the Court finds that while the Suit does not involve core matters, it is “related to” a case under title 11. The Court concludes that it has jurisdiction of this proceeding under 28 U.S.C. § 1334(b) and removal of the Suit was proper under 28 U.S.C. § 1452(a).

C. Remand to State Court

Section 1452(b) of title 28 permits courts to remand removed actions “on any equitable ground.” 28 U.S.C. § 1452(b). Thus, the Court’s focus should be on whether equitable grounds

exist to remand the Suit, which analysis may encompass consideration of some of the elements pertinent to a decision to abstain. Southern Marine and Indus. Servs., Inc. v. AK Eng'g, Inc. (In re AK Servs., Inc.), 159 B.R. 76, 84 (Bankr. D. Mass. 1993). In deciding whether to remand a removed suit, the Court may consider the following factors:

1. the effect of the action on the administration of the bankruptcy estate;
2. the extent to which the issues of state law predominate;
3. the difficulty of applicable state law;
4. comity;
5. the relatedness or remoteness of the action to the bankruptcy case;
6. the existence of a right to a jury trial; and
7. prejudice to the party involuntarily removed from state court.

Cenisth Partners, L.P. v. Hambrecht & Quist, Inc. (In re VideOcart, Inc.), 165 B.R. 740, 744 (Bankr. D. Mass. 1994) (cited in Santa Clara Child Care, 223 B.R. at 46); see also ML Media P'ship, LP v. Century/ML Cable Venture (In re Adelpia Communications Corp.), 285 B.R. 127, 144 (Bankr. S.D.N.Y. 2002). The Court has discretion to determine whether remand is appropriate in a given proceeding. Adelpia Communications, 285 B.R. at 144.

For the reasons discussed below, the Court concludes in its discretion that the Suit should be remanded to state court under 28 U.S.C. § 1452(b). While there is no question that the Suit will have an effect on the administration of the bankruptcy estate to the extent that it determines the amount of liability, if any, the Debtors have to the School, the Suit involves solely state law issues. Although the issues, surrounding the School's claims for conversion, breach of fiduciary duty, unfair or deceptive act or practice under NH RSA 358-A, and willful and wanton conduct,

may not be difficult, comity and the state's interest in developing its own law and applying it to its own citizens suggest remand is appropriate. In the Court's view, deciding the issues raised in the Suit requires no special expertise in bankruptcy or familiarity with the Debtors' bankruptcy case. The events that form the basis for the Suit occurred prepetition.

In addition, the factor of relatedness or remoteness to the Debtors' main bankruptcy case also weighs in favor of remand in this case. A determination that the Debtors, prepetition, converted the School's funds, breached their fiduciary duty to the School, and committed unfair or deceptive acts, and did so willfully and wantonly and with malice, has no connection to the Debtors' bankruptcy except that any award of damages for these alleged wrongful actions will constitute a claim against the bankruptcy estate and may be relevant to this Court's later determination of the dischargeability of the School's claim.

Without deciding whether the School would be entitled to a jury trial on its causes of action, any request for a jury trial militates in favor of remand as this Court could not preside over a jury trial without the School's consent.

The Debtors argue that it would be inequitable to remand the Suit to state court because it would impose heavy travel costs and expenses on the Debtors and subject them to a far less efficient state court litigation process, which does not include electronic filing, the benefit of subpoenas that are effective in critical parts of Vermont and Massachusetts, and telephonic hearings that have already been utilized by the School to minimize its costs. The Court notes that Sullivan County Superior Court is located in closer proximity to the parties and the School's counsel than is this Court so the only inconvenience in remanding the Suit to Sullivan County Superior Court would be to Debtor's counsel. While the Debtors' subpoena power may be

limited in state court and the state court may not have electronic filing, the Court is not convinced that the state court litigation process is less efficient. Considering these factors all together, the Court concludes it would be in the interests of justice to remand the Suit to state court.

III. CONCLUSION

For the reasons set forth above, the Court concludes that the School's Suit was properly removed to this Court pursuant to 28 U.S.C. § 1452(a) as the Court has jurisdiction over this "related to" matter pursuant to 28 U.S.C. § 1334(b). The Court further concludes that there are sufficient equitable grounds to remand the Suit to state court. Accordingly, the Court will enter a separate order granting the School's motion and remanding the Suit to the Sullivan County Superior Court. The Court will also enter a separate order granting the School's motion for relief from the automatic stay so that it may prosecute the Suit to judgment. This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

ENTERED at Manchester, New Hampshire.

Date: March 14, 2006

/s/ J. Michael Deasy
J. Michael Deasy
Bankruptcy Judge